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Supreme Court, U.S.
FILED

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No. (1)

In The

Supreme Court of the United States

RAFAL PIETRZAK,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM REAGAN WYNN
Texas State Bar No. 00797708
KEARNEY | WYNN
505 Main Street, Suite 220
Fort Worth, Texas 76102
(817) 336-5600
(817) 336-5610 (fax)

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

QUESTION ONE:

After Petitioner was convicted by a Texas jury, his counsel rendered ineffective assistance of counsel by failing to timely file a Notice of Appeal. The Court of Criminal Appeals of Texas granted post conviction *habeas corpus* relief and restored him to a procedural position that allowed him to seek review of his conviction via direct appeal, thereby rendering his previously final conviction, nonfinal for Texas law purposes. When Petitioner ultimately sought relief from his conviction pursuant to 28 U.S.C. § 2254, the district court, based on the reasoning of the Fifth Circuit in *Salinas v. Dretke*, held that the statute of limitations under 28 U.S.C. § 2254(d)(1) began running when Petitioner's counsel failed to timely file the Notice of Appeal rather than after Petitioner's conviction was rendered final for Texas law purposes (after it was affirmed on his out-of-time direct appeal). Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine on which date the statute of limitations began running and the validity and applicability of *Salinas v. Dretke* in this situation?

QUESTIONS PRESENTED – Continued

QUESTION TWO:

After Petitioner was convicted by a Texas jury, his counsel rendered ineffective assistance of counsel by failing to timely file a Notice of Appeal. With Petitioner representing himself *pro se*, the Court of Criminal Appeals of Texas granted post conviction *habeas corpus* relief and restored him to a procedural position that allowed him to seek review of his conviction via direct appeal. In doing so, the court informed Petitioner that "all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." Petitioner then timely pursued his direct appeal and state *habeas corpus* remedies and filed the instant section 2254 petition within one year of the conviction becoming final for state law purposes, excluding the time when his subsequent state *habeas* petitions were pending. Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine if this case presents the type of circumstances required for application of the doctrine of equitable tolling to the statute of limitations under 28 U.S.C. § 2254(d)(1)?

LIST OF PARTIES TO THE PROCEEDING

Attorneys for Respondent, The State of Texas:

Hon. Laurine J. Blake	Trial Prosecutor
Hon. Sharon W. Curtis	Trial Prosecutor
Hon. Tom O'Conneell	Appellate Prosecutor
Hon. Katherine K. Decker	State Habeas Corpus Prosecutor

Collin County District Attorney's Office
210 S. McDonald Street
McKinney, Texas 75069

Hon. Charles Palmer	Federal Habeas
Assistant Attorney General	Corpus Prosecutor

Post Conviction Litigation Division
P.O. Box 12548
Austin, Texas 78711

Attorneys for Petitioner, Rafal Pietrzak:

Hon. Ronald W. Danforth	Petitioner's Trial Counsel
Hon. George A. Giles	Petitioner's Trial Counsel

Attorneys at Law
1600 Redbud Boulevard, Suite 306
McKinney, Texas 75069

Roger V. Dickey 2300 W. White Ave., Suite 103 McKinney, Texas 75070	Petitioner's Appellate Counsel
Lorin M. Subar 10000 N. Central Expressway, Suite 1450 Dallas, Texas 75231	Petitioner's Appellate Counsel

LIST OF PARTIES
TO THE PROCEEDING – Continued

Hon. Lawrence Brown 512 Main Street, Suite 308 Fort Worth, Texas 76102	Petitioner's Prior Habeas Corpus Counsel
Wm. Reagan Wynn Kearney | Wynn 505 Main Street, Suite 220 Fort Worth, Texas 76102 (817) 336-5600	Petitioner's Habeas Corpus Counsel

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

CITATIONS TO THE OPINION AND RELEVANT ORDERS 1

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND PROCEEDINGS BELOW 3

Nature of the Case: 3

Course of Proceedings and Disposition Below: 3

Petitioner's Substantive Claims: 9

ARGUMENT AND AUTHORITIES 11

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF THE REASONING OF *SALINAS V. DRETKE* SHOULD GOVERN THE DETERMINATION OF WHEN PETITIONER'S STATUTE OF LIMITATIONS TO FILE A SECTION 2254 PETITION BEGAN RUNNING PURSUANT TO 28 U.S.C. § 2244(d)(1)(A) 11

TABLE OF CONTENTS – Continued

Page

A) Petitioner Initially Lost His Right to Seek Direct Review of His Conviction and Sentence Because of an Error by His Appointed Counsel and Through No Fault of His Own 11

B) As a Matter of State Law, the Court of Criminal Appeals Rendered Petitioner's Conviction Non-Final by Granting Him the Right to Seek Direct Review 12

C) *Salinas v. Dretke* and the District Court's Reliance on It 13

D) Reasons A Certificate of Appealability Should Have Been Issued 15

1) *Salinas* Is Distinguishable 16

2) There Is a Split Among the Circuits as to Whether the Reasoning of *Salinas* Is Valid 17

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF PETITIONER WAS ENTITLED TO EQUITABLE TOLLING OF THE 28 U.S.C. § 2244(d)(1)(A) STATUTE OF LIMITATIONS 18

PRAYER 21

TABLE OF CONTENTS – Continued

Page

APPENDIX

Order in *Pietrzak v. Quarterman*, No. 06-41646 (5th Cir. February 19, 2008) (not designated for publication) ..... App. 1-App. 2

Order of Dismissal in *Pietrzak v. Director*, No. 4:05cv173 (E. Dist. Tex. October 16, 2006) (not designated for publication) ..... App. 3-App. 10

Final Judgment in *Pietrzak v. Director*, No. 4:05cv173 (E. Dist. Tex. October 16, 2006) ... App. 11

Opinion in *Pietrzak v. State*, No. 05-98-01016-CR, slip op., 2000 WL 2679 (Tex. App.–Dallas January 4, 2000, pet. ref'd) ..... App. 12-App. 13

Opinion in *Ex parte Pietrzak*, No. 74,713, slip op. (Tex. Crim. App. September 19, 2001) ..... App. 14-App. 15

TABLE OF AUTHORITIES

Page

CASES

Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005) 17

Jimenez v. Quarterman, 128 S. Ct. 1646 (2008) (mem.) 18

Lawrence v. Florida, 127 S. Ct. 1079 (2007) 19

Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003) 13

Salinas v. Dretke, 354 F.3d 425 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004) ..... *passim*

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) 9

Slack v. McDaniel, 529 U.S. 473 (2000) 16, 18

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2244(d)(1)(A) 2, 3, 11, 16, 20

SUP. CT. R. 10(a) 18

SUP. CT. R. 10(c) 17, 20

TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005) 5

TEX. R. APP. P. 4.1(a) 7

TEX. R. APP. P. 68.2(a) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO THE OPINION AND RELEVANT ORDERS

In an unpublished Order, the United States Court of Appeals for the Fifth Circuit denied Petitioner's Application for Certificate of Appealability seeking review of the district court's decision dismissing his Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254. *Pietrzak v. Quarterman*, No. 06-41646, slip op. (5th Cir. February 19, 2008) (not designated for publication). A copy of the Fifth Circuit's Order is attached in the Appendix at pages App. 1 to App. 2.

In an unpublished Order of Dismissal and Final Judgment, the United States District Court for the Eastern District of Texas, Sherman Division, dismissed Petitioner's Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254. *Pietrzak v. Director*, No. 4:05cv173 (E. Dist. Tex. October 16, 2006) (not designated for publication). A copy of the district court's Order of Dismissal and Final Judgment are attached in the Appendix at pages App. 3 to App. 11.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered an Order denying Petitioner's Application for Certificate of Appealability on February 19, 2008. A copy of the Court of Criminal Appeals' Order appears in the Appendix at pages App. 1 to App. 2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, Section 2244, United States Code:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > . . . .
>
> 28 U.S.C. § 2244(d)(1)(A)

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case:

Petitioner was convicted of aggravated sexual assault of a child and sentenced to thirty (30) years in prison and a $10,000.00 fine by a Collin County, Texas jury. Petitioner's appointed counsel filed his Notice of Appeal one day late, and his appeal was dismissed. Petitioner then filed a state application for Writ of Habeas Corpus and was granted an out-of-time appeal. Petitioner's conviction and sentence were then affirmed on direct appeal.

Petitioner then filed two applications for Writ of Habeas Corpus in Texas state court which were ultimately denied by the Court of Criminal Appeals of Texas. Petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Texas. The district court ultimately dismissed the Petition on the grounds that it was time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A). The United States Court of Appeals for the Fifth Circuit then denied Petitioner's Application for Certificate of Appealability seeking the opportunity to appeal the district court's dismissal of his section 2254 Petition.

Course of Proceedings and Disposition Below:

By an indictment filed April 29, 1997, Petitioner was charged with one count of aggravated sexual

assault and one count of injury to a child in trial court cause number 380-80392-97, pending in the 380th Judicial District Court located in Collin County, Texas.[1 C.R.[1] 5-7] A jury convicted Petitioner of aggravated sexual assault of a child.[1 C.R. 3] The same jury assessed Petitioner's sentence at thirty (30) years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $10,000.00 fine.[1 C.R. 3; 4 C.R. 648] Judgment was entered on March 3, 1998.[4 C.R. 650-52]

At the time judgment was rendered, Petitioner was represented by appointed counsel in state court. Because his appointed counsel timely filed a Motion for New Trial on April 2, 1998, Petitioner had until June 1, 1998, to secure his right to direct appeal by filing a written Notice of Appeal. Petitioner's appointed state court counsel failed to meet that deadline and filed the Notice of Appeal one day late on June 2, 1998.[4 C.R. 687-88, 689]

On January 4, 2000, the state intermediate court of appeals entered an opinion dismissing Petitioner's direct appeal because the Notice of Appeal had been filed one day late. *Pietrzak v. State*, No. 05-98-01016-CR, slip op., 2000 WL 2679 (Tex. App.–Dallas, January 4, 2000, pet. ref'd) (not designated

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[1] Hereinafter, the abbreviation C.R. will be used as citation for the Clerk's Record volumes of the appellate record from the direct appeal and the abbreviation R.R. will be used as citation for the Reporter's Record volumes of the appellate record from the direct appeal.

for publication).[2] On February 9, 2000, the Court of Criminal Appeals of Texas granted Petitioner's *pro se* Motion for Extension of Time to File Petition for Discretionary Review ("PDR") and Petitioner timely filed the PDR on April 3, 2000. That PDR was refused by the Court of Criminal Appeals on June 7, 2000. *Pietrzak v. State*, No. PD-0795-00 (Tex. Crim. App. June 7, 2000) (mem. order) (not designated for publication).

On May 17, 2001, Petitioner, acting *pro se*, filed his first state Application for Writ of Habeas Corpus alleging, *inter alia*, that his court-appointed counsel had rendered ineffective assistance of counsel in violation of the Sixth Amendment by failing to timely file the Notice of Appeal which had resulted in dismissal of Petitioner's direct appeal. On September 19, 2001, the Court of Criminal Appeals granted relief on the claim concerning the untimely filing of the Notice of Appeal and dismissed the remaining claims without prejudice. *Ex parte Pietrzak*, No. 74,173, slip op. (Tex. Crim. App. September 19, 2001) (not designated for publication). The Court of Criminal Appeals' Opinion states as follows:

> This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.[3] After

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[2] A copy of the Court of Appeals of Texas' Opinion is attached in the Appendix at pages App. 12 to App. 13.

[3] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005).

a jury trial, Applicant was convicted of the felony offense of aggravated sexual assault of a child. Punishment was assessed at thirty years confinement in the Texas Department of Criminal Justice, institutional division. Applicant's appeal was dismissed for lack of jurisdiction because notice of appeal was not timely filed. *Pietrzak v. State*, No. 05-98-01016 (Tex. App. – Dallas, delivered January 5, 2000, no pet.[4]).

Applicant contends that he was denied his right to appeal his conviction because his attorney filed notice of appeal one day late. The record supports Applicant's contention.

Applicant is granted an out-of-time appeal in cause number 380-80392-97 of the 380th Judicial District Court of Collin County, Texas. *Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant*

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[4] The designation "no pet." appears to be an oversight by the Court of Criminal Appeals. Information available in the "Case Information" section of the Court of Criminal Appeals' website (www.cca.courts.state.tx.us) clearly indicates that the PDR was filed under cause number PD-0795-00 and was ultimately refused on June 7, 2000.

> *desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is filed in the trial court within thirty days after the mandate of this Court has issued. . . .*

Ex parte Pietrzak, No. 74,173, slip op. at 1-2 (Tex. Crim. App. September 19, 2001) (emphasis added).[5]

Pursuant to the Court of Criminal Appeals' Order, Mandate issued on October 15, 2001. Petitioner timely filed his Notice of Appeal and pursued his direct appeal. The state intermediate court of appeals assigned a new cause number to the appeal and, on January 23, 2003, affirmed Petitioner's conviction and sentence. *Pietrzak v. State*, No. 05-01-1687-CR, slip op., 2002 WL 31957883 (Tex. App.–Dallas January 23, 2003, no pet.) (not designated for publication). Petitioner's time to seek further direct review via PDR expired on Monday, February 23, 2004. *See* TEX. R. APP. P. 4.1(a), 68.2(a). Petitioner did not file a PDR.

Petitioner then filed his second state Application for Writ of Habeas Corpus on August 13, 2003. This Application raised three substantive claims concerning the legality of Petitioner's conviction, including claims of ineffective assistance of counsel and due process violations arising from juror misconduct and improper appointment of a special judge. The Court

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[5] A copy of the Court of Criminal Appeals *per curiam* Opinion is attached in the Appendix at pages App. 15 to App. 16.

of Criminal Appeals of Texas denied relief on this particular application on November 23, 2004. *Ex parte Pietrzak*, No. 49,639-02 (Tex. Crim. App. November 23, 2004) (mem. order) (not designated for publication).

Petitioner filed his third state Application for Writ of Habeas Corpus on May 5, 2005. This Application raised claims concerning the violation of various consular notification requirements in the Vienna Convention and Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972. The Court of Criminal Appeals of Texas denied relief on that application on November 23, 2005. *Ex parte Pietrzak*, No. 49,639-03 (Tex. Crim. App. November 23, 2005) (mem. order) (not designated for publication). On February 23, 2006, Petitioner timely filed his Petition for Writ of Certiorari seeking review of the Court of Criminal Appeals decision and this Court denied Certiorari on October 2, 2006. *Pietrzak v. Texas* 127 S. Ct. 38 (2006) (mem.).

Petitioner filed the instant § 2254 Petition in the district court on May 6, 2005. By a written Order of Dismissal and Judgment entered October 16, 2006, the district court dismissed the Petition as time-barred.[6] Petitioner timely filed his Notice of Appeal on

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[6] A copy of the district court's Order of Dismissal and Final Judgment are attached in the Appendix at pages App. 3 to App. 11.

November 14, 2006, and the district court denied certificate of appealability on March 15, 2007.

Petitioner filed his Application for Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit on May 22, 2007. By an unpublished Order issued February 19, 2008, the court of appeals summarily denied the certificate of appealability.[7]

Petitioner's Substantive Claims:

Because the district court dismissed the instant petition on procedural grounds and neither the district court nor the court of appeals addressed the merits of Petitioner's substantive claims, a brief summary of those claims follows.

Petitioner's third[8] ground of relief alleged that his right to effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated because his trial counsel:

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[7] A copy of the Fifth Circuit's Order is attached in the Appendix at pages App. 1 to App. 2.

[8] Petitioner is a Polish citizen. Petitioner's first and second grounds of relief concerned violations of his at his rights under the Vienna Convention on Consular Relations and The Consular Relations Conventions and Protocols Signed at Warsaw May 21, 1972. Those claims are now foreclosed by this Court's decision in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), which was decided more than a year after Petitioner filed the instant section 2254 Petition.

(1) failed to properly object to the erroneous admission of hearsay statements supposedly made by the alleged injured party;

(2) failed to properly investigate the case by failing to interview the alleged injured party's mother and failing to call her as a witness;

(3) failed to call available good character witnesses to testify;

(4) failed to secure a writ of attachment or otherwise present the testimony of the alleged injured party's primary care pediatrician despite having a subpoena served on the witness and promising the jury in opening statement that said pediatrician would testify;

(5) improperly prevented Petitioner from testifying in his own defense during the guilt-innocence phase of trial by resting the defense case without calling Petitioner to testify despite the fact that Petitioner had unequivocally stated that he wanted to testify;

(6) failed to request that the jury be sequestered or questioned about whether they read an article in the local newspaper which ran during jury deliberations and which praised the prosecutor responsible for prosecuting Petitioner for her tireless efforts on behalf of abused children; and,

(7) called an "expert witness" to testify on Petitioner's behalf who had been denied access to children for examination purposes, had lost a CPS contract because of defense

bias, and had been coercive and manipulative during his interview with the alleged injured party.

Petitioner's fourth ground of relief alleged that Petitioner's due process rights were violated because the jurors in the case improperly negotiated a sentence for Petitioner in exchange for two jurors who did not believe the State had proved its case beyond a reasonable doubt agreeing to change their vote to guilty and then by disregarding the improper agreement during sentencing and arriving at a sentence by averaging the sentence wanted by each juror.

ARGUMENT AND AUTHORITIES

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF THE REASONING OF *SALINAS V. DRETKE* SHOULD GOVERN THE DETERMINATION OF WHEN PETITIONER'S STATUTE OF LIMITATIONS TO FILE A SECTION 2254 PETITION BEGAN RUNNING PURSUANT TO 28 U.S.C. § 2244(d)(1)(A).

A) Petitioner Initially Lost His Right to Seek Direct Review of His Conviction and Sentence Because of an Error by His Appointed Counsel and Through No Fault of His Own

As set out above, Petitioner's appointed counsel filed his original Notice of Appeal one day late, on

June 2, 1998. This resulted in the intermediate appellate court dismissing Petitioner's original direct appeal on February 3, 2000, and the Court of Criminal Appeals of Texas refusing Petitioner's PDR challenging that decision on June 7, 2000. The district court concluded that Petitioner's statute of limitations began running on September 5, 2000, ninety days after that PDR was refused. *See* Order of Dismissal in *Pietrzak v. Director*, No. 4:05cv173, slip op. at 4.

However, also as set out above, on September 19, 2001, Court of Criminal Appeals found that Petitioner was denied his right to appeal because of a mistake made by his appointed counsel and granted Petitioner *habeas corpus* relief in the form of an out-of-time appeal. Nothing in the record indicates that Petitioner was, in any way, responsible for this error by his appointed counsel.

B) As a Matter of State Law, the Court of Criminal Appeals Rendered Petitioner's Conviction Non-Final by Granting Him the Right to Seek Direct Review

The Order issued by the Court of Criminal Appeals specifically stated that "*all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues.*" Thus, under Texas law, Petitioner "was restored to the position of a recently convicted felon, eligible to pursue a form of direct review" of his conviction and

sentence. *See Salinas v. Dretke*, 354 F.3d 425, 428 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004).

As set out above, Petitioner then timely filed Notice of Appeal, a direct appeal to the state intermediate appellate court ensued, and Petitioner's conviction and sentence were affirmed on January 23, 2003. The time for filing a PDR expired on February 24, 2003.[9]

C) *Salinas v. Dretke* and the District Court's Reliance on It

In concluding that Petitioner's statute of limitations began running on September 5, 2000, the district court relied on the Fifth Circuit's Opinion in *Salinas v. Dretke*. *See* Order of Dismissal in *Pietrzak v. Director*, No. 4:05cv173, slip op. at 3 ("The Court notes that Petitioner's first application for writ of

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[9] Assuming that Petitioner ultimately prevails on this procedural argument, his "conviction bec[ame] final when the time for seeking further direct review in the state court expire[d]" and that is the date upon which the AEDPA statute of limitations should have began running. *See, e.g.*, *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). If the statute of limitations began running on February 24, 2003, 171 days expired before Petitioner's second state Application for Writ of Habeas Corpus was filed on August 14, 2003. One hundred sixty three (163) more days expired between November 23, 2004, (the date on which the Court of Criminal Appeals denied relief on the second state Application) and May 5, 2005, (the date on which Petitioner's third state Application was filed). Thus, a total of 334 days of the statute of limitations had expired when the instant Petition was filed on May 6, 2005.

habeas corpus was clearly collateral and the granting of an out-of-time appeal during collateral proceedings does not restart the running of the limitations period.").

In *Salinas*, a Texas inmate had timely pursued the direct appeal of his capital murder conviction. *Salinas*, 354 F.3d at 427. Salinas' attorney failed to notify him that his conviction had been affirmed by the intermediate court of appeals. *Id.* As a result, Salinas missed the deadline for filing a Petition for Discretionary Review ("PDR") seeking review of the intermediate court of appeals' decision by the Court of Criminal Appeals of Texas. *Id.* Salinas ultimately filed a state application for *habeas corpus* relief arguing that he should be granted an out-of-time right to file a PDR since his attorney had failed to timely notify him of the affirmance thereby depriving him of the opportunity to timely file the PDR in the first place. *Id.* The Court of Criminal Appeals of Texas ultimately agreed and granted the state *habeas* petition. *Id.* In doing so, the Court of Criminal Appeals granted Salinas the right to file an "out-of-time" PDR, the effect of which "was to 'return [Salinas] to the point at which he can file a petition for discretionary review. . . . For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the Court of Appeals' decision had been rendered on the day the mandate of the Court of Criminal Appeals issues.'" *Id.* at 428.

In its analysis, the Fifth Circuit noted that, under Texas law, Salinas had been "restored to the

position of a recently convicted felon, eligible to pursue a form of direct review in the Court of Criminal Appeals." *Id.* However, the Fifth Circuit went on to note that, "On its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between. So long as the petitioner is being held pursuant to the same state court judgment, nothing in AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action. Rather, the statutory framework only provides for the tolling of limitations during the pendency of state collateral review." *Id.* at 429-30 (citations omitted).

The Fifth Circuit then held that, since Salinas' right to file an "out-of-time" PDR was secured through state *habeas* proceedings, it "does not arise under the 'direct review' procedures of the Texas judicial system." *Id.* at 431. Accordingly, the Fifth Circuit ultimately held that the Court of Criminal Appeals' granting of the "out-of-time" PDR did not alter the fact that the limitations period had already began running and lapsed. *Id.*

D) Reasons A Certificate of Appealability Should Have Been Issued

The Fifth Circuit should have granted Petitioner's Application for Certificate of Appealability

because "jurists of reason would find it debatable"[10] whether the reasoning of *Salinas* should govern the question of whether Petitioner's statute of limitations under 28 U.S.C. § 2244(d)(1)(A) began running on September 5, 2000, or February 24, 2003. The validity and applicability of *Salinas* in this situation is debatable for two reasons.

1) *Salinas* Is Distinguishable

Salinas is distinguishable from the case at bar because it dealt with a situation where the Court of Criminal Appeals granted an out-of-time PDR rather than an out-of-time appeal. By granting an out-of-time appeal, the Court of Criminal Appeals effectively, as a matter of law, changed the date upon which sentence was imposed upon Petitioner thereby restarting the appellate and post-conviction calendars on that date. In the situation present in *Salinas*, the Court of Criminal Appeals action did not reset the date upon which sentence was imposed, but merely effectively changed the date upon which the intermediate appellate court's ruling was issued. In the situation at bar, because he was granted an entirely new direct appeal, Petitioner's judgment did not become "final by the conclusion of direct review or the expiration of the time for seeking such review"[11] until

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[10] *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[11] *See* 28 U.S.C. § 2244(d)(1)(A).

his direct appeal was completed. Thus, *Salinas* does not directly control this situation.

By refusing to even review the district court's holding that *Salinas* does control this situation, the Fifth Circuit has effectively decided an important question of federal law that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(c).

2) There Is a Split Among the Circuits as to Whether the Reasoning of *Salinas* Is Valid

To the extent that *Salinas* does control this situation, Petitioner respectfully asserts that *Salinas* was wrongfully decided and that the Fourth Circuit's reasoning in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), should control.

The *Frasch* court was faced with an identical situation to the one at bar. In that case, the court specifically rejected the reasoning of *Salinas* and held that, while the petitioner had utilized a collateral proceeding to obtain his right to direct appeal, that collateral proceeding "ended with the order granting him the right to file a belated application for leave to appeal" and, at that point, the petitioner was seeking direct review. *Id.* at 522-24. Accordingly, the *Frasch* court held that the AEDPA statute of limitations did not expire until the petitioner's time for seeking further direct review expired after his initial direct appeal was refused.

Given that the decisions in *Salinas* and *Frasch* are directly at odds with each other and that this is an important procedural issue which is sure to arise in other circuits in the future, this Court should exercise its supervisory power to resolve this issue. *See* SUP. CT. R. 10(a). On March 17, 2008, apparently recognizing this split in the circuits on this procedural issue, this Court granted *certiorari* to resolve an identical procedural issue.[12] *See Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008) (mem.).

II.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF PETITIONER WAS ENTITLED TO EQUITABLE TOLLING OF THE 28 U.S.C. § 2244(d)(1)(A) STATUTE OF LIMITATIONS.

Although this Court has never expressly held as such, it appears that the 28 U.S.C. § 2244(d) statute

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[12] The precise question presented in *Jimenez* is, "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244(d)(1)(A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

of limitations is subject to the principles of equitable tolling. *See, e.g., Lawrence v. Florida*, 127 S. Ct. 1079, 1985 (2007) (assuming without deciding that equitable tolling applies). To be entitled to equitable tolling, a petitioner must demonstrate (1) that he has been diligently pursuing his rights, and (2) that some extraordinary circumstance prevented him from timely filing. *See, e.g., id.*

After determining that, pursuant to the logic of *Salinas*, Petitioner's statute of limitations had run on June 16, 2003, and that the instant Petition was time-barred, the district court also concluded that Petitioner has failed to show the "rare and exceptional" circumstances that would merit equitable tolling of the statute of limitations in this case.

As set out above and in the district court's Order of Dismissal, Petitioner's appointed state court counsel dropped the ball on his direct appeal which is the only reason that *Salinas* could operate to start his statute of limitations running in June 2003.

To compound this problem, Petitioner filed a *pro se* state *habeas* petition (within one year of the denial of his initial PDR) and was told by the Court of Criminal Appeals that he would be granted a direct appeal and that "*all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues.*" In other words, the highest criminal court in the State of Texas effectively told Petitioner that the statute of limitations (a "time

limit") would be calculated as if his trial had concluded in 2001 instead of 1998.

Petitioner then timely pursued his direct appeal and, after his case was affirmed, timely retained counsel who filed his second state habeas petition within six months of his case being affirmed on direct appeal.

Finally, all of this occurred before the Fifth Circuit handed down its opinion in *Salinas*. Therefore, neither Petitioner nor his counsel were on notice that the Court of Criminal Appeals' representation that "all time limits" had been reset did not include the "time limit" imposed by 28 U.S.C. § 2244(d)(1)(A).

Under these circumstances, it is debatable among jurists of reason whether the "rare and exceptional" circumstances meriting equitable tolling exist and the Fifth Circuit should have granted a certificate of appealability to resolve the issue. This Court has resolved neither the issue of whether the doctrine of equitable tolling does, in fact, apply to statute of limitations imposed by section 2244(d) nor the issue of whether circumstances similar to those presented in this case would justify equitable tolling if it does apply. Therefore, Petitioner respectfully submits that this Court should take this opportunity to settle this important issue of federal law. *See* SUP. CT. R. 10(c).

PRAYER

Petitioner therefore prays that this Court will grant this Petition, order such further briefing as this Court feels appropriate, and remand this cause with directions that the United States Court of Appeals for the Fifth Circuit issue a Certificate of Appealability and consider Petitioner's appeal from the district court's dismissal of his 28 U.S.C. § 2254 Petition.

Respectfully submitted,

WILLIAM REAGAN WYNN
State Bar No. 00797708 (Texas)

KEARNEY | WYNN
505 Main Street, Suite 220
Fort Worth, Texas 76102
(817) 336-5600
(817) 336-5610 (fax)

Attorney for Petitioner
Rafal Pietrzak

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-41646
USDC No. 4:05-CV-173

RAFAL PIETRZAK, also known as Rafal Ted Pietrzak

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

(Filed Feb. 19, 2008)

ORDER:

Rafal Pietrzak, Texas prisoner # 826611, seeks a certificate of appealability (COA) following the dismissal of his 28 U.S.C. § 2254 petition as untimely. Pietrzak is serving a 30-year prison sentence for the aggravated sexual assault of a five-year-old child.

Pietrzak contends that his § 2254 petition should be deemed timely because the granting of an out-of-time state appeal should have restarted the limitation period of 28 U.S.C. § 2244(d)(1)(A). Alternatively he contends that the limitation period should have been equitably tolled. He also argues his substantive claims of ineffective assistance of counsel, jury misconduct, and the deprivation of rights granted by the Vienna Convention and a 1972 Warsaw treaty.

Pietrzak has failed to show that reasonable jurists would find the district court's procedural ruling debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). His motion for a COA is DENIED.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	CIVIL ACTION NO.
VS.	§	4:05cv173
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

(Filed Oct. 16, 2006)

The above-entitled and numbered civil action was referred to United States Magistrate Judge Don D. Bush, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed as time-barred. The Petitioner has filed objections.

The Report of the Magistrate Judge, which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Petitioner are without merit.

The Court is of the opinion that the unique facts of this case necessitate a detailed discussion about whether the petition is time-barred. On March 3, 1998, the Petitioner was convicted of the offense of

Aggravated Sexual Assault in Collin County. The Petitioner had to file a notice of appeal by June 1, 1998. The notice of appeal was filed one day late on June 2, 1998, thus the state intermediate court of appeals dismissed the appeal as untimely. The Texas Court of Criminal Appeals granted him a motion for an extension of time to file a petition for discretionary review, but the Texas Court of Criminal Appeals ultimately refused his petition for discretionary review on June 7, 2000.

The Petitioner then began collateral challenges to his conviction. He filed his first application for a writ of habeas corpus on May 17, 2001. On September 19, 2001, the Texas Court of Criminal Appeals granted him an out-of-time appeal. The state intermediate court of appeals affirmed his conviction on January 23, 2003. The Petitioner did not file a petition for discretionary review. He filed a second application for a writ of habeas corpus on August 14, 2003, which was denied without written order on the trial court findings without a hearing on November 23, 2004. A third application for a writ of habeas corpus was filed on May 5, 2005. The Texas Court of Criminal Appeals denied the application without written order on November 23, 2005. The Petitioner filed a petition for a writ of certiorari, Cause Number 05-1079, which was denied on October 2, 2006. The present petition was filed on May 6, 2005.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law. The law made several changes to the federal habeas

corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The appropriate limitations provision in this case is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. The provisions of 28 U.S.C. § 2244(d)(2), a tolling section, provide that the time during which a properly filed application or other collateral review shall not count toward any period of limitation. The initial question for the Court concerns when the conviction became final. Citing *Foreman v. Dretke,* 383 F.3d 336 (5th Cir. 2004), the Director argued that the conviction became final when the deadline for the Petitioner to file his notice of appeal expired on June 1, 1998. The Petitioner argued that his conviction became final when the time expired for him to file his second petition for discretionary review expired on February 24, 2003.

The terms of § 2244(d)(1)(A) specify that a judgment of conviction becomes "final by the conclusion of direct review or the expiration of the time for seeking such review." In *Foreman,* the Fifth Circuit concluded that the "provision supplies two alternate methods under which a conviction can become final: direct review can end or the time to pursue the direct review can expire." 383 F.3d at 338. The Fifth Circuit noted that the distinction between whether a review of a conviction is viewed as direct or collateral can be critical, and the dispositive issue in *Foreman* was whether the appellant "filed a timely appeal in the state court system." *Id.* at 341. In the present case,

the Petitioner's opportunity to file a notice of appeal expired on June 1, 1998. He did not file a timely appeal, and his conviction arguably became final at that time. The Court notes that the Petitioner's first application for a writ of habeas corpus was clearly collateral and the granting of an out-of-time appeal during collateral proceedings does not restart the running of the limitations period. *Salinas v. Dretke,* 354 F.3d 425 (5th Cir. 2004), *cert. denied,* 541 U.S. 1032 (2004).

The novel issue before the Court concerns how to treat the period of time between June 2, 1998, and June 7, 2000. Should the Petitioner's efforts to appeal from the decision of the intermediate court and to obtain a decision by the Texas Court of Criminal Appeals be viewed as direct or collateral? The Court has not uncovered any Fifth Circuit cases directly on point. A cursory review of *Foreman* would lead to the conclusion that this period of time should not be viewed as direct review since the appeal was untimely. In *Salinas,* however, the Fifth Circuit held that if the granting of an "out-of-time" petition for discretionary review "comes as a result of direct review, there would be no basis for limitations even to begin running until the Court of Criminal Appeals has finalized the judgment by declining to grant relief on that level of appeal. If, on the other hand, an 'out-of-time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief." *Id.* at 430. In *Foreman,* the Fifth Circuit examined *Salinas* and

concluded that it was required to look at state law to determine whether the granting of an out-of-time PDR was part of the direct review process or collateral review. 383 F.3d at 339.

In the present case, the Texas Court of Criminal Appeals granted the Petitioner an extension of time to file a petition for discretionary review as part of the direct appeal process. The Texas Court of Criminal Appeals subsequently refused the petition on June 7, 2000. This period of time was considered by state law as part of the direct review process and should be treated as such. The Petitioner did not file a petition for a writ of certiorari, thus his conviction became final ninety days after the decision of the Texas Court of Criminal Appeals refusing his petition for discretionary review. *Foreman,* 383 F.3d at 338 (citing *Roberts v. Cockrell,* 319 F.3d 690, 694 (5th Cir. 2003)). *See also Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir. 1999). The Texas Court of Criminal Appeals refused his petition for discretionary review on June 7, 2000. The conviction became final ninety days later on September 5, 2000. The present petition was due no later than September 5, 2001, in the absence of tolling provisions. It was not filed until May 6, 2005.

It is again noted that the provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. The Petitioner filed his first application for a writ of habeas corpus on May 17, 2001, which resulted in an out-of-time

appeal. This collateral proceeding ended when the opportunity to file a petition for discretionary review expired on February 24, 2003. The collateral proceeding was pending 648 days, thus the deadline of September 5, 2001, was tolled 648 days to June 16, 2003. The Petitioner did not file his second application for a writ of habeas corpus in state court until August 14, 2003. The pendency of the second application, as well as the third application, did not effectively toll the deadline unless some other tolling provision is applicable.

The Petitioner argued that he should be entitled to equitable tolling. The Fifth Circuit has held that the one year limitations period is a statute of limitations, not a bar to federal jurisdiction, thus the limitations period can be equitably tolled. *Davis v. Johnson,* 158 F.3d 806, 807 (5th Cir. 1998), *cert. denied,* 526 U.S. 1074 (1999). The basic principles of equitable tolling were discussed in *Ott v. Johnson,* 192 F.3d 510, 513-514 (5th Cir. 1999), *cert. denied,* 529 U.S. 1099 (2000):

> we recognize that the equitable tolling doctrine is to be applied only if the relevant facts present sufficiently "rare and exceptional circumstances" that would warrant application of the doctrine. We recently explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that

"excusable neglect" does not support equitable tolling.

The Fifth Circuit went on to find that there was no error in the district court's decision not to apply the doctrine of equitable tolling regarding delays associated with the Texas Court of Criminal Appeals' notification system through mailed postcards. *Id.* at 514. Other decisions by the Fifth Circuit held that inadequacies in a prison law library likewise do not provide a basis for equitable tolling. *Felder v. Johnson,* 204 F.3d 168 (5th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000). A prisoner is not entitled to equitable tolling for the seven week gap between the date he submitted a state petition for post-conviction relief to prison officials for mailing and the date the petition was stamped filed. *Coleman v. Johnson,* 184 F.3d 398 (5th Cir. 1999). The fact that a prisoner did not receive notice of the statute of limitations until 43 days after AEDPA's effective date did not warrant equitable tolling. *Fisher v. Johnson,* 174 F.3d 710 (5th Cir. 1999). Likewise, his confinement in a psychiatric ward for seventeen days on medication and without his glasses did not warrant equitable tolling. *Id.* Finally, a claim of actual innocence, standing alone, is not the type of "rare and exceptional" circumstance which would justify equitable tolling "given that many prisoners maintain that they are innocent." *Felder v. Johnson,* 204 F.3d at 171.

In the present case, the Petitioner focused on the decision of the Texas Court of Criminal Appeals granting him an out-of-time appeal on September 19,

2001, which stated that "all time limits should be calculated as if the sentence has been imposed on the date that the mandate of this Court issues." The order of the Texas Court of Criminal Appeals merely concerned the new deadline for the Petitioner to file a notice of appeal from his conviction. The order had nothing to do with possible federal petitions for a writ of habeas corpus. The Petitioner has not shown "rare and exceptional" circumstances warranting equitable tolling. The present petition was filed too late and is time-barred. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 16th day of October, 2006.

/s/ Michael H. Schneider
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	CIVIL ACTION NO.
VS.	§	4:05cv173
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

(Filed Oct. 16, 2006)

The Court having considered the Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED** with prejudice.

SIGNED this 16th day of October, 2006.

/s/ Michael H. Schneider
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

2000 WL 2679

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7, UNPUBLISHED OPINIONS HAVE NO PRECEDENTIAL VALUE BUT MAY BE CITED WITH THE NOTATION "(not designated for publication)."

Court of Appeals of Texas, Dallas.
Rafal Ted PIETRZAK, Appellant,
v.
The STATE of Texas, Appellee.
No. 05-98-01016-CR.

Jan. 4, 2000.

On Appeal from the 380th Judicial District Court, Collin County, Texas, Trial Court Cause No. 380-80392-97.

Before Justices KINKEADE, JAMES, and FITZGERALD.

MEMORANDUM OPINION

JAMES.

A jury convicted Rafal Ted Pietrzak of aggravated sexual assault. March 3, 1998, sentence of thirty years confinement and a $10,000 fine was imposed. Appellant filed a timely motion for new trial on April 2, 1998, thus his notice of appeal was due by June 1, 1998. See TEX.R.APP.P. 21.4(a), 26.2(a)(2). Appellant

filed his notice of appeal on June 2, 1998, one date late.[1] Because appellant's notice of appeal is untimely, we do not have jurisdiction over the appeal. *See Slaton v. State,* 981 S.W.2d 208, 210 (Tex.Crim.App.1998) (per curiam); *Olivo v. State,* 918 S .W.2d 519, 523 (Tex.Crim.App.1996); *Boyd v. State,* 971 S.W.2d 603, 605 (Tex.App. – Dallas 1998, no pet.). Accordingly, we dismiss the appeal for want of jurisdiction.

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[1] The Court directed appellant and the State to file briefs addressing our jurisdiction over the appeal. Appellant filed a brief stating that sentence was imposed on January 27, 1999, appellant signed a pro se motion for new trial and notice of appeal on February 24, 1999, and the documents were filestamped March 3, 1999. These dates do not apply to this appeal. The State asserts we do not have jurisdiction because the notice of appeal is late.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 74,173

EX PARTE RAFAL TED PIETRZAK, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM COLLIN COUNTY

The opinion was delivered per curiam.

OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P. After a jury trial, Applicant was convicted of the felony offense of aggravated sexual assault of a child. Punishment was assessed at thirty years confinement in the Texas Department of Criminal Justice, institutional division. Applicant's appeal was dismissed for lack of jurisdiction because notice of appeal was not timely filed. *Pietrzak v. State,* No. 05-98-01016 (Tex. App. – Dallas, delivered January 5, 2000, no pet.).

Applicant contends that he was denied his right to appeal his conviction because his attorney filed notice of appeal one day late. The record supports Applicant's contention.

Applicant is granted an out-of-time appeal in cause number 380-80392-97 of the 380th Judicial District Court of Collin, County, Texas. Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is filed in the trial court within thirty days after the mandate of this Court has issued. Applicant's remaining claims are dismissed. *Ex parte Torres,* 943 S.W.2d 469 (Tex. Crim. App. 1997).

DELIVERED: September 19, 2001
DO NOT PUBLISH

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Supreme Court, U.S.
FILED
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No. (2)

In The
Supreme Court of the United States

RAFAL PIETRZAK,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WILLIAM REAGAN WYNN
Texas State Bar No. 00797708
KEARNEY | WYNN
505 Main Street, Suite 220
Fort Worth, Texas 76102
(817) 336-5600
(817) 336-5610 (fax)

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	
VS.	§	CIVIL ACTION NO. 4:05 CV 173
DIRECTOR	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 2, 2006)

Petitioner Rafal Pietrzak, an inmate confined in the Texas prison system proceeding *pro se,* brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

History of the Case

On March 3, 1998, the Petitioner was convicted of aggravated sexual assault in the 380th Judicial District Court of Collin County, Texas, following a plea of not guilty. He was sentenced to 30 years imprisonment and a $10,000.00 fine. He filed a direct appeal which was dismissed because notice of appeal was filed one day late. His petition for discretionary review was refused on June 7, 2000. He sought and was granted an out-of-time appeal through state habeas corpus. The judgment was then affirmed on

appeal on January 23, 2003. He filed two applications for a post-conviction writ of habeas corpus in state court which were denied on November 24, 2004, and November 23, 2005, respectively.

The present petition was filed on May 6, 2005. Respondent filed his Motion to Dismiss on July 7, 2006.

Petitioner alleges the following:

1. Violation of rights under the Vienna Consular Relations and Due Process rights, because the police failed to notify the Polish Consulate that Pietrzak had been detained and because the police failed to admonish him that he had a right to request assistance from the Polish Consulate;

2. Violation of rights under the Consular Relations Convention and Protocols signed at Warsaw and Due Process Rights, because the police failed to notify the Polish Consulate that Petition [sic] had been detained and because the police failed to admonish him that he had a right to request assistance from the Polish Consulate;

3. Ineffective assistance of counsel;

4. Jury Misconduct/due process violations.

Discussion and Analysis

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA")

was signed into law. The law made several changes to the federal habeas corpus statutes. 28 U.S.C. § 2244(d)(1) imposes a one year statute of limitations for habeas cases filed by state prisoners. The Fifth Circuit discussed the approach that should be taken in applying the one year statute of limitations in *Flanagan v. Johnson,* 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson,* 159 F.3d 914 (5th Cir. 1998). Section 2244(d)(1)(A) specifies that the one year limitations period shall run from the date a judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

In the present case, according to his application and information from the Texas Court of Criminal Appeals: The Petitioner was convicted on March 3, 1998. His notice of appeal was filed one day late but the Court of Appeals did not issue a dismissal until January 4, 2000. His conviction was final for purposes of calculating his federal limitations period on February 3, 2000. He filed his Petition for Discretionary Review 84 days after the Court of Appeals dismissed his case – on April 27, 2000. His Petition for Discretionary Review was refused on June 30, 2000. He did not file his state petition for writ of habeas corpus for 321 days. He filed May 17, 2001, and it was denied on June 7, 2001. He waited just 11 days before filing a state petition for writ of habeas corpus seeking out-of-time appeal. He filed his application on June 18, 2001, and was granted out-of-time appeal on September 19, 2001, with mandate on October 15, 2001. On October 11, 2001, he filed his timely notice

of appeal and on January 23, 2003, his conviction was affirmed. Petitioner waited 203 days before filing his second state court petition for writ of habeas corpus. He filed on August 14, 2003 and was denied, without written order on finding of the trial court without a hearing, on November 24, 2004. He waited 162 days before filing his third state court petition for writ of habeas corpus. He filed on May 5, 2005, and was denied without written order on November 23, 2005. He waited 164 days to file his federal application for writ of habeas corpus on May 6, 2006. He thereafter filed his Petition for Writ of Certiorari which appears to be pending at this time.

Petitioner's claims are timebarred. His claims regarding his trial are timebarred based on 28 U.S.C. 2244(d)(1)(A). As to his claims regarding the Vienna Convention, the Supreme Court, in *Breard v. Greene,* 523 U.S. 371 (1998), held that claims regarding the Vienna Convention are subject to procedural default rules. *See also, Sanchez-Llamas v. Oregon,* ___ U.S. ___, 2006 WL 1749688 (June 28, 2006); *Cardenas v. Dretke,* 405 F.3d 244, 252-253 (5th Cir. 2005). The Supreme Court did not decide whether the Vienna Convention grants individual rights. *Sanchez-Llamas,* 2006 WL at *7. Thus, the Supreme Court did not issue a new rule of constitutional law that serves as a triggering event for the AEDPA statute of limitations pursuant to 28 U.S.C. § 2244(d)(1)(D). Petitioner's

claims regarding the Vienna Convention are time-barred.[1]

In the present case, the Petitioner waited over seven years after his actual conviction to bring this action. Even with tolling, Petitioner is over two years outside the statute of limitations. The Petitioner has not shown that any of the other provisions of § 2244(d) or principles of equitable tolling save the petition; thus, it is barred by the statute of limitations.

Recommendation

It is accordingly recommended that the Motion to Dismiss filed by Respondent should be granted and the above-styled petition for writ of habeas corpus should be denied and the case should be dismissed with prejudice.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file

---

[1] It is also questionable whether the Vienna Convention would apply in that it does not appear that Petitioner has alleged or shown that he requested consular assistance or informed police that he was a citizen of Poland. *See, U.S. v. Lombera-Camorlinga*, 206 F.3d 882, 885, 9th Cir. 2000) [sic]. It is further is not [sic] clear what result Petitioner seeks from the application of the Vienna Convention or what harm he alleged was incurred because he was not told of his consular rights. Suppression of evidence or confessions is not an available remedy for violation of the Vienna Convention. *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001)

written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 1 day of August, 2006.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
OCT 17 2008
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No. 07-1474

In The

Supreme Court of the United States

RAFAL PIETRZAK,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

*EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

KENT C. SULLIVAN
First Assistant
Attorney General

MARTA R. McLAUGHLIN
Assistant Attorney General
Postconviction Litigation Division

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

P.O. Box 12548,
Capitol Station
Austin, Texas 78711
(512) 936-1400

* Counsel of Record

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Under the Fifth Circuit's reasoning in *Salinas v. Dretke*, an out-of-time appeal granted through a state's collateral proceedings tolls AEDPA's one-year limitations period under 28 U.S.C. § 2244(d)(2), but does not restart that limitations period under 28 U.S.C. § 2244(d)(1)(A). Applying *Salinas*, the District Court dismissed Pietrzak's federal habeas petition as untimely. Should a certificate of appealability ("COA") have issued to review this precedent where Pietrzak failed to address the validity of the claims stated in his petition and failed to seek *en banc* rehearing of the COA denial?

2. Under Fifth Circuit precedent, AEDPA's statute of limitations is subject to equitable tolling. The District Court found that Pietrzak had not shown "rare and exceptional" circumstances warranting equitable tolling, and dismissed his petition as untimely. Should a COA have issued to review the District Court's factual findings and application of equitable-tolling principles where Pietrzak failed to address the validity of the claims stated in his petition and failed to demonstrate that reasonable jurists would find the District Court's ruling debatable?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATEMENT OF THE CASE 1

I. State court proceedings 1

II. Federal court proceedings 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. Because Pietrzak did not even attempt to make a substantial showing of the denial of a constitutional right, the court correctly denied his COA request and Pietrzak's petition for certiorari review should be denied. 6

TABLE OF CONTENTS, (continued)

PAGE

II. Certiorari review should be denied on the first question presented. The Fifth Circuit did not err in denying a COA where Pietrzak's federal habeas petition was untimely under the Fifth Circuit's correctly-decided precedent and Pietrzak did not seek en banc rehearing of the denial. 9

A. Pietrzak's federal habeas petition was time-barred under established Circuit precedent. 10

B. Because Circuit precedent established that Pietrzak's claims were time-barred, and he did not seek *en banc* rehearing of the denial, his petition should be denied. 15

C. Because the Court of Appeals correctly determined that the granting of an out-of-time appeal does not restart the limitations period under § 2244(d)(1)(A), but rather continues to toll under § 2244(d)(2) until such proceedings are completed, certiorari review should be denied. 19

TABLE OF CONTENTS, (continued)

PAGE

III. There is no compelling reason for the Court to review the Fifth Circuit's appropriate denial of a COA regarding equitable tolling where Fifth Circuit precedent assumes that equitable tolling is applicable to AEDPA's limitations period, and Pietrzak failed to demonstrate that reasonable jurists would find debatable the District Court's denial of equitable tolling in his case. 23

A. This case does not provide a good vehicle for the Court to determine whether equitable tolling is applicable to AEDPA's limitations period. 24

B. The Fifth Circuit properly denied a COA on the issue of equitable tolling because Pietrzak failed to demonstrate that the District Court's ruling was debatable. 25

1. Pietrzak was neither actively misled nor prevented by some extraordinary circumstance from filing his federal habeas petition in a timely manner. . . . 27

TABLE OF CONTENTS, (continued)

PAGE

2. Pietrzak was not diligent in pursuing federal relief for his claims. 30

CONCLUSION 34

TABLE OF AUTHORITIES

Cases	Page
Barefoot v. Estelle, 463 U.S. 880 (1983)	7
Batson v. Kentucky, 476 U.S. 79 (1986)	8
Bowles v. Russell, __ U.S. __, 127 S. Ct. 2360 (2007)	25
Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115 (5th Cir. 1992)	16
Carey v. Saffold, 536 U.S. 214 (2002)	22
Clay v. United States, 537 U.S. 522 (2003)	20
Coleman v. Johnson, 184 F.3d 398 (5th Cir.1999)	26
Cousin v. Lensing, 310 F.3d 843 (5th Cir. 2002)	32
Covey v. Ark. River Co., 865 F.2d 660 (5th Cir. 1989)	27
Davis v. Johnson, 158 F.3d 806 (5th Cir.1998)	24, 26
Day v. McDonough, 547 U.S. 198 (2006)	23
DiCenzi v. Rose, 452 F.3d 465 (6th Cir. 2006)	20
Duncan v. Walker, 533 U.S. 167 (2001)	19
Felder v. Johnson, 204 F.3d 168 (5th Cir. 2000).	28

TABLE OF AUTHORITIES, (CONTINUED)

Cases **Page**

Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999) 26, 27

Foreman v. Dretke, 383 F.3d 336 (5th Cir. 2004) 14, 30

Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005) 22

Gonzalez v. Sec'y, Dep't of Corr., 366 F.3d 1253 (11th Cir. 2004) 16

Gordon v. Sec'y, Dept. of Corr., 479 F.3d 1299 (11th Cir. 2007) 16

Hernandez v. Cockrell, No. 4:02cv720-Y, 2002 WL 31875606 (N.D. Tex. Dec. 19, 2002) 29

Hohn v. United States, 524 U.S. 236 (1998) 1

Jimenez v. Quarterman, No. 07-6984 (March 17, 2008) 5, 10, 19

Larry v. Dretke, 361 F.3d 890 (5th Cir. 2004) 26

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000) 9

Lookingbill v. Cockrell, 293 F.3d 256 (5th Cir. 2002) 9

TABLE OF AUTHORITIES, (CONTINUED)

Cases **Page**

Lopez v. Wilson, 426 F.3d 339 (6th Cir. 2005) 20

Miller-El v. Cockrell, 537 U.S. 322 (2003) 7, 8

O'Neal v. Kenny, 501 F.3d 969 (8th Cir. 2007) 20

Orange v. Calbone, 318 F.3d 1167 (10th Cir. 2003) 22

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 25, 26

Panetti v. Quarterman, 127 S. Ct. 2842 (2007) 21

Rhines v. Weber, 544 U.S. 269 (2005) 33

Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003) . . . 14

Rowell v. Dretke, 398 F.3d 370 (5th Cir. 2005) 16

Salinas v. Dretke, 354 F.3d 425 (5th Cir. 2004) . . . . . passim

Santiago Salgado v. Garcia, 384 F.3d 769 (9th Cir. 2004) 17

Scott v. Johnson, 227 F.3d 260 (5th Cir. 2000) 15

Slack v. McDaniel, 529 U.S. 473 (2000) . . . . . passim

TABLE OF AUTHORITIES, (CONTINUED)

Cases **Page**

Slaton v. State, 981 S.W.2d 208 (Tex. Crim. App. 1998) 13

Soffar v. Cockrell, 300 F.3d 588 (5th Cir. 2002) 17

Teas v. Endicott, 494 F.3d 580 (7th Cir. 2007) . . 20, 22

Thomas v. United States, 328 F.3d 305 (7th Cir. 2003) 17

Towles v. Dretke, No. 4:03 cv 0822 (N.D. Tex. Dec. 10, 2003) 29

United States v. Ogle, 415 F.3d 382 (5th Cir. 2005) 17, 27

United States v. Patterson, 211 F.3d 927 (5th Cir. 2000) 26

United States v. Torres, 115 F.3d 1033 (D.C. Cir. 1997) 16

Winkfield v. Bagley, 66 Fed. Appx. 578, (6th Cir. 2003) 29, 33

Statutes and Rules

28 U.S.C. § 2244 . . . . . passim

28 U.S.C. § 2253 . . . . . 6, 7

TABLE OF AUTHORITIES, (CONTINUED)

Page

FED. R. APP. P. 28 ..... 17, 27

Tex. R. App. P. 21.4 (West 1998) 12

Tex. R. App. P. 26.2(a)(2)(West 1998) 1, 12

Tex. R. App. P. 26.3 (West 1998) 12

Miscellanous

The New Oxford American Dictionary 483 (2001) . . . 21

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, ("the Director"), respectfully files this brief in opposition to the petition for writ of certiorari filed by Rafal Pietrzak ("Pietrzak").

JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 240 (1998).

STATEMENT OF THE CASE

I. State court proceedings.

Pietrzak was convicted by a jury of aggravated sexual assault of a child and sentenced to thirty years of confinement in the Correctional Institutions Division of the Texas Department of Criminal Justice, on March 3, 1998, in the 380th Judicial District Court in Collin County, Texas, in cause number 380-80392-97, styled *The State of Texas v. Rafal Pietrzak*. 4 CR 650-52.[1] Pietrzak filed a motion for new trial on April 2, 1998. 4 CR 664. Pietrzak did not file a notice of appeal by June 1, 1998, as required under Texas law to perfect his direct appeal. Tex. R. App. P. 26.2(a)(2)(West 1998)(Where a timely motion for new trial is filed, the defendant must

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[1] "CR" refers to the Clerk's Record on appeal preceded by volume number and followed by the relevant page numbers.

file notice of appeal within ninety days after the date sentence is imposed to perfect appeal.).

Pietrzak filed a notice of appeal on June 2, 1998. 4 CR 698. The Court of Appeals for the Fifth Judicial District of Texas requested briefing on the threshold issue of jurisdiction on October 26, 1999, noting that it appeared the notice of appeal had been filed a day late and that no motion to extend time had been filed with the court. *Pietrzak v. State*, NO. 05-98-01016-CR, Letter from Court. The court ultimately entered an order dismissing the appeal for lack of jurisdiction explaining that Pietrzak's counsel had filed the notice of appeal one day too late. *Pietrzak v. State*, No. 05-98-01016-CR, slip op., 2000 WL 2679 (Tex. App. – Dallas, Jan. 4, 2000, pet. ref'd)(unpublished).

Pietrzak challenged this dismissal in the Court of Criminal Appeals through a Petition for Discretionary Review ("PDR"). The Texas Court of Criminal Appeals granted him an extension of time to file a PDR, but ultimately refused the timely-filed petition on June 7, 2000. *Pietrzak v. State*, No. PD-0795-00 (Tex. Crim. App. June 7, 2000)(unpublished).

Almost a year later, on May 17, 2001, Pieterzak filed a state habeas application alleging, in part, ineffective assistance of counsel based on the untimely filing of his notice of appeal resulting in the dismissal of his direct appeal. *Ex parte Pietrzak*, Application No. 49,639-01 ("SHCR-01") at 3. The Court of Criminal Appeals granted relief on that claim, allowing him an opportunity to file an out-of-time appeal, and dismissed the remaining claims without prejudice. *Ex parte*

Pietrzak, No. 74, 173, slip op. (Tex. Crim. App. Sept. 19, 2001)(unpublished).

Pietrzak timely filed his notice of out-of-time appeal according to the provisions set out in the court's order granting relief and pursued his out-of-time appeal. On January 23, 2003, the Fifth District Court of Appeals affirmed Pietrzak's conviction and sentence under the new cause number assigned to his out-of-time appeal. *Pietrzak v. State*, No. 05-01-1687-CR, slip op., 2002 WL 31957883 (Tex. App.– Dallas Jan. 23, 2003, no pet.)(unpublished). The court granted Pietrzak an extension of time to March 7, 2003, to file a motion for rehearing. Pietrzak did not file a motion for rehearing or a PDR.

On August 14, 2003, almost six months after the court of appeals issued its decision, Pietrzak filed a second state habeas application challenging his conviction. *Ex parte Pietrzak*, Application No. 49,639-02 ("SHCR-02") at index. The Court of Criminal Appeals denied relief on November 23, 2004. SHCR-02 at cover.

On May 5, 2005, almost six months after his second application was denied, Pietrzak filed a third state habeas application challenging his conviction. *Ex parte Pieterzak*, Application No. 49,639-03 ("SHCR-03") at index. The Court of Criminal Appeals denied relief on the claims raised in that application on November 23, 2005. SHCR-03 at cover. This Court denied Pietrzak's petition seeking certiorari review of that denial on October 2, 2006. *Pietrzak v. Texas*, 127 S. Ct. 38 (2006)(mem. op.).

II. Federal court proceedings.

Pietrzak filed his federal habeas petition on May 6, 2005. District Court Docket Entry ("D.E.") 1. The petition did not address the limitations issue. *Id.* The Director was ordered to file a response. D.E. 3. The Director filed a motion to dismiss the petition as time-barred. D.E. 8. Pietrzak did not file a response to the motion. The Magistrate Judge entered findings and recommended that the petition should be dismissed as untimely, relying in part on *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004). D.E. 9. Pietrzak filed objections to the Magistrate Judge's recommendation, arguing that *Salinas* was wrongly decided or did not apply and, in the alternative, that he was entitled to equitable tolling. D.E. 14. The District Court, also relying in part on *Salinas*, entered its order and final judgment on October 16, 2006, dismissing the case with prejudice as untimely. D.E. 15, 16.

Pietrzak filed notice of appeal on November 14, 2006, which the District Court construed as a motion for a COA and denied as such. D.E. 17, 18. On May 24, 2007, Pietrzak filed his application for a COA in the Fifth Circuit. COA Appl. The Fifth Circuit denied the motion on February 19, 2008. *Pietrzak v. Quarterman*, No. 06-41646. The Court determined that Pietrzak had failed to show that reasonable jurists would find the District Court's procedural ruling debatable or wrong. *Id.* Pietrzak did not request en banc rehearing of this denial.

Pietrzak filed his petition for a writ of certiorari from the Fifth Circuit's denial on February 19, 2008. The Court requested this response.

SUMMARY OF ARGUMENT

Certiorari should be denied for the following reasons. The Fifth Circuit correctly denied a COA where Pietrzak failed to meet his burden of making a substantial showing that his petition stated a valid claim of the denial of a constitutional right.

Specifically, certiorari should be denied regarding the first question presented because the Fifth Circuit's denial of a COA was correct where Pietrzak failed to raise an issue that would be debatable under established Circuit precedent and failed to file a motion for *en banc* rehearing of the denial. Alternatively, certiorari should be denied because the Fifth Circuit's resolution of the question is correct—the granting of an out-of-time appeal as relief through habeas proceedings does not restart the limitations period under § 2244(d)(1)(A). The Fifth Circuit's interpretation promotes the purposes of AEDPA's statute of limitations, is consistent with principles of statutory construction, and is supported by a consensus among many other Circuits. Moreover, there is no compelling reason to grant review of the issue in this case when it is currently under review by the Court in *Jimenez v. Quarterman*, No. 07-6984 (March 17, 2008), and will be resolved by the Court's decision in that case.

Certiorari should also be denied regarding the second question presented. Under Fifth Circuit precedent, equitable tolling is already presumed to apply to AEDPA's limitations period. Therefore, determining such applicability would not result in relief. Further, Pietrzak has not shown that the denial of equitable tolling under the circumstances in his case was debatable or that it conflicts with precedent from this Court, the

Fifth Circuit, or other Circuit courts. Moreover, the District Court's denial of equitable tolling was correct where Pietrzak was neither diligent in pursing his federal habeas relief nor prevented from doing so in a timely manner. The issue is fact-bound and would not have broad applicability.

For all these reasons, Pietrzak's petition for certiorari review should be denied.

ARGUMENT

Rule 10 of this Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefore. As demonstrated below, there is no compelling reason for this Court to exercise its discretion to grant review of this case. Accordingly, certiorari review should be denied.

I. Because Pietrzak did not even attempt to make a substantial showing of the denial of a constitutional right, the court correctly denied his COA request, and Pietrzak's petition for certiorari review should be denied.

Under AEDPA, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The federal District Court dismissed Pietrzak's habeas petition because it found the petition was filed outside AEDPA's one-year limitations period. DE 15, 16. This was a procedural disposition. Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components. *Slack v.*

McDaniel, 529 U.S. 473, 484-85 (2000). One component is "directed at the underlying constitutional claims" and the other is "directed at the District Court's procedural holding." *Id.* at 485.

This Court has stressed that failure to show both components is fatal to a petitioner's COA application:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component . . . is part of a threshold inquiry. A court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

Slack, 529 U.S. at 484-85.

Accordingly, to obtain a COA from the Fifth Circuit Court of Appeals, Pietrzak was required to make a substantial showing as to both components. To make a substantial showing, "[a] petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Therefore, Pietrzak had to show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Although this "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims[,]" it does require "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. This means that "[a] prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Id.* at 338 (quoting *Barefoot*, 463 U.S. at 893).

In *Miller-El*, resolution of the petitioner's COA application required a preliminary consideration of the factual allegations presented and the three-step framework mandated by *Batson* as necessary to proving and obtaining relief on a *Batson* claim. *See Miller-El*, 537 U.S. at 238-341 (addressing claim raised under *Batson v. Kentucky*, 476 U.S. 79 (1986)). In this case, it would at least require preliminary consideration of the elements required and the facts alleged to prove each of the specific claims Pietrzak had raised.

In his application for a COA, Pietrzak presented no argument that reasonable jurists would find it debatable whether his petition stated a valid claim for federal habeas relief. *See generally* COA Appl. Rather, Pietrzak merely listed the substantive claims that he had asserted in his federal habeas petition. *Id.* at 6-9 (listing his consular relations, ineffective assistance, and due process claims). After stating the standard required for obtaining a COA, including this Court's note in *Miller-El* that the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims," Pietrzak declined to provide *any* argument whatsoever to satisfy the showing that reasonable jurists would find it debatable whether the petition stated a

valid claim. *Id.*, at 9-16. Pietrzak's application for a COA did not provide sufficient information to allow the Fifth Circuit to even preliminarily assess the elements and facts of his claims. Thus, the Fifth Circuit had no basis to conclude that jurists of reason would find it debatable whether he had stated a valid claim. Under Fifth Circuit precedent, Pietrzak waived the issue by failing to brief it. *See Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) (citing *Lockett v. Anderson*, 230 F.3d 695, 711 n.27 (5th Cir. 2000)("Where a habeas petitioner fails to brief an argument adequately, we consider it waived.")).

Although the Fifth Circuit did not specifically address this prong of *Slack* in denying a COA, other than to note that Pietrzak had argued what his substantive claims were, Pietrzak's failure to even allege the debatability of the merit of his claims, and thus his failure to make a substantial showing that his petition stated a valid claim of the denial of a constitutional right, was fatal to his motion for a COA. *See* COA Order at 1-2. Because he failed to satisfy this prong of *Slack*, a COA should not have issued to review the District Court's procedural ruling. For this reason alone, Pietrzak's petition for certiorari review should be denied.

II. Certiorari review should be denied on the first question presented. The Fifth Circuit did not err in denying a COA where Pietrzak's federal habeas petition was untimely under the Fifth Circuit's correctly-decided precedent and Pietrzak did not seek en banc rehearing of the denial.

Pietrzak seeks review of the Fifth Circuit's denial of a COA to review whether a State's provision of habeas relief by way of an out-of-time appeal restarts— under §

2244(d)(1)(A)— AEDPA's one-year limitations period. Pet. Cert. at 11.[2] Certiorari review should be denied on this issue. The Fifth Circuit appropriately denied a COA where Pietrzak's federal petition was untimely under Circuit precedent and he failed to seek *en banc* rehearing of denial. Additionally, the Fifth Circuit's holding in *Salinas* is correct– state habeas relief in the form of out-of-time appellate proceedings does not restart AEDPA's limitations period under § 2244(d)(1)(A), is correct. Therefore, there is no compelling reason for this Court to grant certiorari review of this issue in this case where resolution of the issue will not lead to a different result.

A. Pietrzak's federal habeas petition was time-barred under established Circuit precedent

Under established Fifth Circuit precedent, Pietrzak's federal habeas petition was barred by AEDPA's statute of limitations. AEDPA provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the

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[2] This Court granted certiorari review of the same issue in *Jimenez v. Quarterman*. The Court's decision in Jimenez may be dispositive of this issue. Therefore, there is no reason to grant certiorari review of the issue in this case.

conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(West 2008).

Pietrzak's judgment of conviction was entered and sentence imposed on March 3, 1998. 1 CR 4 (docket sheet); 4 CR 659 (judgment); 8 RR[3] 1, 36-37 (reporter's record reflecting sentence being imposed); 4 CR 664 (motion for new trial). He timely filed a motion for new trial on April 2, 1998. Tex. R. App. P. 21.4 (West 1998). Pietrzak's notice of appeal was therefore due by June 1, 1998, ninety days after the date his sentence was imposed or suspended. Tex. R. App. P. 26.2(2)(West 1998). Pietrzak's notice of appeal, however, was not filed by counsel until June 2, 1998. 4 CR 698, 700. Pietrzak did not file a motion to extend the time for filing his notice of appeal as provided by Texas Rule of Appellate Procedure 26.3, which allowed for such extension if filed within fifteen days after the deadline for filing the notice of appeal. Tex. R. App. P. 26.3 (West 1998). Pietrzak's conviction became final under § 2244(d)(1)(A) on June 1, 1998, when the time for seeking direct review of his conviction expired, and his one-year limitations period began to run on that date.

On October 26, 1999, after Pietrzak had filed his initial Appellant's brief, the intermediate court of appeals sent a letter to the parties requesting briefing on the threshold issue of jurisdiction. *Pietrzak v. Texas*, No. 05-98-01016-CR, Letter from Court. The court stated that the record reflected that sentence was imposed on March 3, 1998, and that the notice of appeal was due on June 1,

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[3] "RR" refers to the Reporter's Record in this case, preceded by the volume number and followed by the relevant page number(s).

1998, but was not filed until June 2, 1998, and that no extension motion had been filed. *Id.* The parties briefed the issue. Pietrzak's counsel was unable to provide any argument that the notice of appeal was timely. Instead, counsel set forth the law and the facts, recognizing the court's inability to suspend the operation of the rules in order to extend the time limit for filing notice of appeal and that, absent a timely-filed notice of appeal, the court of appeals lacked jurisdiction over the appeal. *Pietrzak v. Texas*, No. 05-98-01016-CR, Appellant's Brief at 1-4, citing *Slaton v. State*, 981 S.W.2d 208 (Tex. Crim. App. 1998)(Rule allowing appellate court to suspend operation of rules in particular cases does not allow court to extend jurisdictional time limit for filing notice of appeal). The intermediate court of appeals dismissed Pietrzak's appeal for lack of jurisdiction on January 4, 2000. *Pietrzak v. State*, slip op.

Pietrzak chose to challenge this dismissal in the Court of Criminal Appeals through a Petition for Discretionary Review ("PDR"). The Texas Court of Criminal Appeals granted him an extension of time to file a PDR, but ultimately refused the timely-filed petition on June 7, 2000. *Pietrzak v. State*, No. PD-0795-00 (Tex. Crim. App. June 7, 2000)(unpublished).

Although Pietrzak filed a notice of appeal resulting in state court proceedings, because the time for seeking direct review of his conviction had expired on June 1, 1998, without a timely notice being filed, and because that time was not extended by the court of appeals, Pietrzak's AEDPA limitations period began to run on June 2, 1998.[4] 28 U.S.C. §2244(d)(1)(A); *See*

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[4] The Magistrate Judge concluded, without citation to any authority, that Pietrzak's AEDPA limitations period did not

Roberts v. Cockrell, 319 F.3d at 694 (if defendant stops appeal process before obtaining ruling from state court of last resort, conviction becomes final when time for seeking further direct review in state court expires); *compare Foreman v. Dretke*, 383 F.3d at 340 (limitations period began to run after PDR was denied because *both* intermediate appeal and PDR were timely filed). The proceedings that resulted from Pietrzak's filing of an untimely notice of appeal was not direct review of the conviction as referred to in § 2244(d)(1)(A), because the time for seeking such review had already expired. Nor was it collateral review of the conviction as contemplated for tolling under § 2244(d)(2). The state courts concluded that the late-filed notice of appeal did not invoke the court's jurisdiction to review Pietrzak's conviction.

Pietrzak's AEDPA limitations period expired on June 2, 1999. There were no collateral proceedings pending between June 2, 1998, and June 2, 1999, to toll

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begin to run until the intermediate appellate court had dismissed his untimely appeal for lack of jurisdiction. D.E. 9 at 2. The District Court concluded that Pietrzak's attempt to pursue an untimely appeal, and the Court of Criminal Appeals granting Pietrzak a motion to extend time to file a PDR, constituted direct appeal and found that Pietrzak's limitations period did not begin until ninety days after his PDR was refused. Pet. Cert., App. 6-7. Under Fifth Circuit precedent, both of these conclusions were clearly erroneous. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003); *compare Foreman v. Dretke*, 383 F.3d 336, 340 (5th Cir. 2004). However, even under the District Court's erroneous calculations, Pietrzak's federal petition was untimely. The District Court concluded that Pietrzak's limitations period began to run on September 5, 2000, was tolled for 648 days during the pendency of his first state habeas and out-of-time appeal proceedings, and expired without further tolling on June 16, 2003, two months before he filed his second state habeas application, and almost two years before he filed his federal petition. Pet. Cert., App. 7-8.

Pietrzak's limitations period under § 2244(d)(2). The state habeas and out-of-time appeal proceedings that Pietrzak pursued were commenced too late to toll the limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (stating that where the state habeas application is not filed until after federal limitation period has run, filing does not toll limitation period under § 2244(d)(2)). Nor did Pietrzak argue in the courts below that any[5] of his claims were subject to a later start date under Sections 2244(d)(1)(B), (C), or (D). The lower courts determined that no other provision of § 2244(d) or equitable tolling applied to Pietrzak's claims. D.E. 9 at 3; D.E. 15.

B. Because Circuit precedent established that Pietrzak's claims were time-barred, and he did not seek *en banc* rehearing of the denial, his petition should be denied.

Pietrzak argued to the District Court that because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process, in February 2003. D.E. 14 at 5-6. He made the same argument in his application for a COA. COA Appl. at 11-12.

The District Court recognized that circuit precedent foreclosed this argument. Pet. Cert., App. 6.

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[5] Pietrzak did argue that § 2244(d)(1)(C) applied to his claims pertaining to the Vienna Convention; however, he has now waived those claims. Pet. Cert. at 9 n. 8. In referring to Pietrzak's claims, the Director does not include the waived claims unless otherwise stated.

Salinas established that remedies derived from collateral review, like an out-of-time appeal, toll AEDPA's limitations period under § 2244(d)(2) but do not "restart" the period under § 2244(d)(1)(A). *Salinas*, 354 F.3d at 430. Thus, the District Court dismissed Pietrzak's petition and denied his COA application. The Fifth Circuit agreed.

These decisions applied the settled principle that circuit precedent binds district courts and circuit panels. *E.g.*, *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 (5th Cir. 1992); *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). That is, although the COA standard asks whether the procedural ruling is "debatable among jurists of reason," *Slack*, 529 U.S. at 484, it is not "debatable" that district and circuit courts must follow circuit precedent in reviewing COA applications. *E.g.*, *Gordon v. Sec'y, Dept. of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007) ("If the petitioner's contention about the procedural ruling against him is foreclosed by a binding decision . . . the attempted appeal does not present a substantial question, because reasonable jurists will follow controlling law."); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) ("[R]easonable jurists would not be able to debate whether this issue should have been resolved in a different manner by the district court [because] . . . . [c]ircuit precedent has specifically rejected the argument . . . .").

Binding precedent does not foreclose a circuit court from reconsidering that precedent's resolution of issues posed in a COA application because the court can always revisit that precedent through en banc rehearing of a COA denial. *E.g.*, *Gonzalez v. Sec'y, Dep't of Corr.*, 366 F.3d 1253, 1260, 1262 (11th Cir. 2004) (en banc) (granting rehearing en banc to address two panels' COA

denials); *Soffar v. Cockrell*, 300 F.3d 588, 590 & n.1 (5th Cir. 2002) (en banc) (after en banc review, reinstating panel's COA grants and denials); *see also Santiago Salgado v. Garcia*, 384 F.3d 769, 775 (9th Cir. 2004) (explaining that inmates denied COA may seek rehearing en banc); *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003) (noting that "[o]ccasionally the denial of a request for a COA will present the sort of legal question that justifies rehearing en banc"). Pietrzak, however, did not seek rehearing en banc of his COA denial.

Although Pietrzak argued to both the District Court and the Fifth Circuit, as he does in his petition to this Court, that *Salinas* was distinguishable from his case and therefore did not control, both courts implicitly rejected the debatability of this argument. D.E. 14 at 6; Pet. Cert., App. 6; COA Appl. at 12-13. Pietrzak failed to adequately brief this argument in his application for a COA and did not demonstrate that reasonable jurists would find it debatable whether *Salinas* controlled in his case. His argument failed to cite authority, highlighted irrelevant factual distinctions, mis-stated the legal significance of the facts under state law, and presented no argument as to why the legal reasoning in *Salinas* would not apply to such facts.

First, he waived this argument by failing to properly brief it. He failed to cite to the record or authority, and failed to cite to any legal decisions that might indicate that reasonable jurists would find the issue debatable. *See United States v. Ogle*, 415 F.3d 382, 383-84 (5th Cir. 2005) (argument not raised in appellant brief as required by Fed. R. App. P. 28 is waived); *see also* FED. R. APP. P. 28(a)(4) (appellant argument must contain

reasons he deserves requested relief, with citation to authorities, statutes and record).

Further, Pietrzak's argument focused on facts that were irrelevant to the reasoning in *Salinas*. In *Salinas*, the Fifth Circuit determined that AEDPA's limitations period did not provide for multiple start dates; that the out-of-time PDR was obtained, and could only be obtained, through collateral proceedings; and that such proceedings were necessarily the product of collateral review and therefore did not constitute direct review proceedings under § 2244(d)(1)(A). *See Salinas*, 354 F.3d at 429, 431. Pietrzak argued that he had been granted an out-of-time appeal as opposed to an out-of-time PDR, and that the date his sentence was imposed had therefore been changed, as a matter of law. COA Appl. at 12-13.

As an initial matter, Pietrzak's argument mischaracterized the state court's order. It did not "effectively, as a matter of law, chang[e] the date upon which sentence was imposed. . . [;]" rather, it instructed how the deadlines for his out-of-time appeal should be calculated under the Texas Rules of Appellate Procedure. *See* COA Appl. at 13.

Further, the import of his argument may have been that under his interpretation, the time for pursuing direct appeal had never expired. However, this same reasoning would have applied to an out-of-time PDR where the time for filing a PDR under the Rules of Appellate Procedure was calculated as if the court of appeals's opinion had been issued the date the state court's mandate granting the relief was issued. Therefore, Pietrzak argued a factual distinction without

a legally relevant difference for a proposition that had already been rejected by the Fifth Circuit in *Salinas*.

Furthermore, a COA had already been denied in another case where an out-of-time appeal had been granted and *Salinas* had been applied to find the federal habeas petition untimely. *See Jimenez v. Quarterman*, No. 06-11240 (5th Cir. May 31, 2007, denied coa). Therefore, the application of *Salinas* to out-of-time appeals had already been tacitly determined by the Fifth Circuit and it would have been necessary to seek *en banc* rehearing of this issue as well.

In his COA application, Pietrzak failed to properly brief and failed to demonstrate that reasonable jurists would find it debatable that *Salinas* controlled where Texas courts granted an out-of-time appeal as habeas relief. Because the District Court correctly applied binding circuit precedent to dismiss Pietrzak's claims, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition," *Slack*, 529 U.S. at 484, or that a COA should issue.

C. Because the Court of Appeals correctly determined that the granting of an out-of-time appeal does not restart the limitations period under § 2244(d)(1)(A), but rather continues to toll under § 2244(d)(2) until such proceedings are completed, certiorari review should be denied.

The Fifth Circuit's interpretation of § 2244(d) is consistent with the principles of statutory construction and promotes the purposes of AEDPA's statute of limitations: comity, finality, and federalism. *See Duncan*

v. Walker, 533 U.S. 167, 178 (2001)(purpose of AEDPA statute of limitations is to "further the principles of comity, finality, and federalism"). Several other Circuits have reached the same correct conclusion.[6]

The text of § 2244(d)(1)(A) does not allow for multiple finality dates for state-court judgements. *See Teas v. Endicott*, 494 F.3d 580, 581 (7th Cir. 2007). Nor does it contemplate a situation in which both expiration and completion occur in the same case or in which the time for pursuing direct review expires multiple times. It defines *the* date by which the conviction shall be deemed final for the purposes of AEDPA limitations.

Finality, for purposes of § 2244(d)(1)(A), does not rely on state law defining when a judgment is final or whether various state court proceedings function like direct appeal. This would defeat Congress's intent in defining finality in § 2244(d)(1)(A) to establish a uniform federal rule for limitations, because the state practices regarding what relief is available for ineffective assistance of counsel on appeal and how such relief may be sought vary greatly. *Clay v. United States*, 537 U.S. 522, 531 (2003).

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[6] *See Lopez v. Wilson*, 426 F.3d 339, 341-49 (6th Cir. 2005)(*en banc, per curiam*)(motion for out-of-time appeal was collateral proceeding); *DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006)(in *dicta*, granting out-of-time-appeal does not restart AEDPA's limitations); *Teas v. Endicott*, 494 F.3d 580, 582-83 (7th Cir. 2007)(belated appeal granted through collateral habeas proceedings did not restart AEDPA limitations period); *O'Neal v. Kenny*, 501 F.3d 969, 970-71 (8th Cir. 2007)(grant of new direct appeal did not constitute direct review for purposes of AEDPA).

Section 2244(d)(1)(A) does ensure that the limitations period will not begin to run until the risk of altering the judgment through the usual direct-review process is exhausted through either conclusion of review by a decision of this Court or by the expiration of time for seeking such review. 28 U.S.C. §2244(d)(1)(A). Although AEDPA does not define the term "direct review," the term "direct" has been defined as "extending or moving from one place to another by the shortest way without changing direction or stopping"; "without intervening factors or intermediaries." The New Oxford American Dictionary 483 (2001). And there is nothing "direct" about an out-of-time appeal obtained through postconviction or other collateral-review proceedings. Rather, these out-of-time appeals necessarily involve intervening habeas or other postconviction proceedings and are awarded as a method of relief associated with that collateral review. *E.g.*, *O'Neal*, 501 F.3d at 970-71; *Salinas*, 354 F.3d at 430.

Further, Congress provided for anticipated exceptional circumstances in Sections 2244(d)(1)(B)-(D), by providing later start dates. Therefore, there is no reason to believe that Congress intended for § 2244(d)(1)(A) to address the exceptional circumstance that arises when an inmate learns months or years later that his direct appeal failed due to ineffective assistance of counsel. *Cf. Panetti v. Quarterman*, 127 S. Ct. 2842, 2853 (2007)(noting that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here"). This is especially true when Congress

chose to require diligence where exceptional circumstances arise, and no such diligence is required under § 2244(d)(1)(A), and where obtaining an out-of-time appeal is dependent upon action taken by the petitioner.

Out-of-time appeals awarded through postconviction or collateral review are not part of the "direct review" process under AEDPA and cannot "restart" § 2244(d)(1)(A)'s limitations period. *See Salinas*, 354 F.3d at 430 ("If . . . an 'out of time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief."); *see also O'Neal*, 501 F.3d at 970-71 (holding that a new direct appeal awarded as part of state postconviction relief did not "restart" the limitations period under § 2244(d)(1)(A)); *Teas*, 494 F.3d at 582 (holding that a belated "direct" review granted as relief on collateral review did not renew the limitations period under § 2244(d)(1)(A)).[7]

However, out-of-time appeals, being part of collateral review, toll the applicable limitations period until they are finally resolved. *See* 28 U.S.C. § 2244(d)(2); *Salinas*, 354 F.3d at 430. *Salinas*'s application of § 2244(d)(2) interprets the statute broadly to effect AEDPA's goal of comity—*i.e.*, giving the States the opportunity to address constitutional error in the first instance. *Carey v. Saffold*, 536 U.S. 214, 219-21

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[7] *But see Frasch v. Peguese*, 414 F.3d 518, 521-25 (4th Cir. 2005) (holding that an out-of-time appeal obtained through postconviction proceedings was nonetheless "direct review" for the purpose of § 2244(d)(1)(A) and "restarted" § 2244(d)(1)(A)'s limitations period); *Orange v. Calbone*, 318 F.3d 1167, 1170-71 (10th Cir. 2003) (same).

(2002)(demonstrating that reasonable reading of § 2244(d)(2) that fulfills AEDPA's purposes is preferable to a hyper-technical reading that thwarts those purposes.).

The Fifth Circuit's interpretation of § 2244(d) is consistent with AEDPA's framework and goals. It properly applies AEDPA's requirement that an inmate act promptly and diligently once he learns of his ineffective-assistance claim, thereby avoiding unnecessary delay, promoting judicial efficiency, and securing the finality of state-court judgments within a reasonable time. *See Day v. McDonough*, 547 U.S. 198, 205-06 (2006). At the same time, this reading also meets AEDPA's comity goal by tolling the federal limitations period until all state proceedings addressing the inmate's claims have been exhausted. *Duncan*, 533 U.S. at 179. And it fulfills AEDPA's goals while still allowing inmates a full and fair opportunity to obtain federal habeas review.

III. There is no compelling reason for the Court to review the Fifth Circuit's appropriate denial of a COA regarding equitable tolling where Fifth Circuit precedent assumes that equitable tolling is applicable to AEDPA's limitations period and Pietrzak failed to demonstrate that reasonable jurists would find debatable the District Court's denial of equitable tolling in his case.

There is no compelling reason for the Court to review the Fifth Circuit's denial of a COA regarding whether equitable tolling is warranted in Pietrzak's case. Pietrzak has not cited to any Supreme Court case with which the rulings of the lower court conflicts nor cases from other Circuits indicating a split on the issue of

whether equitable tolling would apply in a case such as Pietrzak's. The issue is bound to the particular facts of Pietrzak's case and would not have far-reaching effect. Further, both the District Court and the Fifth Circuit presumed that AEDPA limitations are subject to such tolling. The District Court's denial of equitable tolling and the Fifth Circuit's denial of a COA to review that determination were both correct. Pietrzak's second question presented does not merit certiorari review.

A. This case does not provide a good vehicle for the Court to determine whether equitable tolling is applicable to AEDPA's statute of limitations.

Pietrzak argues that the Court should take this opportunity to determine the important issue of whether AEDPA's statute of limitations is subject to equitable tolling. Pet. Cert. 18-20. This case, however, does not provide a good vehicle for the Court to determine that issue. Such determination would not affect the ultimate outcome of this case. The lower courts proceeded on the premise that equitable tolling *is* applicable to AEDPA's statute of limitations.

The Fifth Circuit has held that AEDPA's limitations period may be equitably tolled. *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). In this case, the Fifth Circuit denied a COA to review only the issue of whether the District Court erred in determining that equitable tolling was not warranted in this case based on the facts alleged by Pietrzak, not whether AEDPA's statute of limitations is subject to equitable tolling. Therefore, even if the Court were to find that equitable

tolling is available for prisoners who file § 2254 petitions,[8] the Court could not find that the Fifth Circuit erred in denying a COA to review the equitable-tolling issue on this basis alone. Resolution of the second question presented would require the Court to review the District Court's determinations underlying the conclusion that equitable tolling was not warranted in this particular case, on these particular facts. Such determination was correct and was not debatable.

B. The Fifth Circuit properly denied a COA on the issue of equitable tolling because Pietrzak failed to demonstrate that the District Court's ruling was debatable.

The Fifth Circuit correctly determined that the District Court's denial of equitable tolling was not debatable. Pietrzak had neither been diligent in pursuing his claims nor actively misled or prevented by some extraordinary circumstance from timely filing his federal habeas petition. The state court's order granting Pietrzak an out-of-time appeal did not purport to, and could not, dictate the manner in which AEDPA's limitations would be calculated. And both the language of the statute and federal court decisions provided notice of how Pietrzak's time limitations would be calculated:

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[8] *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005). In *Bowles v. Russell*, this Court recently found that statutory time limits created by Congress are not subject to equitable exceptions. __ U.S. __, 127 S. Ct. 2360 (2007). The time limits created in 28 U.S.C. § 2244(d) are statutory and were created by Congress. Consequently, although the Director did not have an opportunity to argue this in the courts below, based on this new Supreme Court precedent, the Director contends that equitable tolling is not applicable to federal habeas petitions.

that an out-of-time appeal would not restart the limitations period.

This Court has said with respect to equitable tolling in general, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

The Fifth Circuit has explained:

> "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). Equitable tolling will be granted in "rare and exceptional circumstances," *id.* at 811, and will not be granted if the applicant failed to diligently pursue his rights, *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000). "Equitable tolling applies principally when the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999). "[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir.1999).

Larry v. Dretke, 361 F.3d 890, 896-97 (5th Cir. 2004).

Thus, a petitioner cannot merely sit on his rights when some rare and extraordinary circumstance comes his way, he cannot acquiesce in or turn a blind eye to the circumstance. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999)(citing *Covey v. Ark. River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)).

Pietrzak failed to demonstrate in his COA application that reasonable jurists would find debatable the District Court's denial of equitable tolling. He provided, almost verbatim, the argument presented to this Court. COA Appl. at 14-16. He provided no legal support for his arguments. He provided no analogous case to support that reasonable jurists would debate whether the state court's order granting an out-of-time appeal would constitute an extraordinary circumstance preventing a petitioner from timely-filing his petition. He provided nothing to support that reasonable jurists would debate whether the absence of a Circuit Court opinion stating how the statute of limitations would apply where an out-of-time appeal has been granted would constitute such an extraordinary circumstance. Pietrzak's failure to properly brief the issue by citing authority in support of his argument waived the issue. *See Ogle*, 415 F.3d at 383-84; *see also* FED. R. APP. P. 28(a)(4). Pietrzak failed to meet his burden. Thus, the Fifth Circuit did not err in denying a COA.

1. Pietrzak was neither actively misled nor prevented by some extraordinary circumstance from filing his federal habeas petition in a timely manner.

Pietrzak's argument that he was misled or prevented from filing his federal habeas petition in a

timely manner is without merit. Pietrzak argues that he was misled by the order of the Court of Criminal Appeals granting him an out-of-time appeal, understanding it to mean that his AEDPA limitations period would be reset along with his time for filing a notice of appeal in state court. Pet. Cert. at 19-20. He also argues that *Salinas* was not decided until after he had filed his second state writ application, such that his misunderstanding went unchecked. Pet. Cert. at 20.

The Court of Criminal Appeals's order granting Pietrzak an out-of-time appeal, however, did not purport to dictate the manner in which AEDPA's limitations would be calculated. In fact, the order specifically addressed only how the time limits should be calculated "[f]or the purposes of the Texas Rules of Appellate Procedure." *Ex parte Pietrzak*, No. 74,173, slip op. at 1-2 (Tex. Crim. App. Sept. 19, 2001). Nor could the state court dictate how AEDPA's limitations period would be calculated. Pietrzak ignores the court's limiting clause and focuses only on the words "all time limits. . . ," without respect to the context of those words or the absence of state court authority to dictate federal law. If Pietrzak was misled, it was not by the terms of the state court's order, but by his own erroneous reading of it. However, a petitioner's legal ignorance or misunderstanding and lack of legal assistance is not a rare and exceptional circumstance entitling a petitioner to equitable tolling. *See Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000).

Moreover, Pietrzak's reading of the state court's order was contrary to the terms of AEDPA's statute of limitations, itself. The statute provides for only one start date based on the finality of the conviction: completion of

direct review or the expiration of the time for seeking such review. 28 U.S.C. §2244(d)(1)(A). And while it provides for alternative later start dates, it does not provide for restarting the limitations period once it has already commenced. 28 U.S.C. §2244(d)(1). Instead, it provides only a provision for tolling the running of the limitations period based on pending properly-filed collateral proceedings. 28 U.S.C. §2244(d)(2).

Further, Pietrzak's argument that he is entitled to equitable tolling because the issue had not yet been decided by the Fifth Circuit is irrelevant as lack of such authority does not prevent one from filing a federal habeas petition or from acting diligently in such pursuit. *See* Pet. Cert. 19-20. He has not argued that his interpretation that the state court's order would act to restart AEDPA's limitations period was supported by any federal court decision. Pet. Cert. 19-20; 5th Cir. COA Appl. 14-16. His argument is also without merit because the issue was addressed by federal district courts in Texas and by other federal circuit courts of appeals, even in relation to out-of-time appeals, years before it was addressed in *Salinas*. *See e.g. Hernandez v. Cockrell,* No. 4:02cv720-Y, 2002 WL 31875606 (N.D. Tex. Dec. 19, 2002)(unpublished)(out-of-time PDR did not restart the limitations period); *Towles v. Dretke*, No. 4:03cv0822, 2003 WL 22952820 (N.D. Tex. Dec. 10, 2003)(unpublished)(out-of-time appeal did not restart the limitations period, but petition was timely due to equitable tolling); *Winkfield v. Bagley*, 66 Fed. Appx. 578, 582, 2003 WL 21259699 (6th Cir. 2003) (unpublished)(delayed appeal did not restart limitations period). And again, although *Salinas* addressed an out-of-time PDR and not an out-of-time appeal, Pietrzak has failed to argue how there would be any legally-relevant

reason to believe that the holding would not equally apply to Pietrzak's out-of-time appeal given the Fifth Circuit's reasoning in that case. Pet. Cert. at 20; COA Appl. at 15.

Regardless of the source of Pietrzak's misunderstanding, he was not actively misled by the State or the state court to believe that his federal limitations had been restarted by the state court's order. Neither the state court's order nor his own misunderstanding of it constitute a rare and exceptional circumstance. Nor was he prevented by the state court's order or his misunderstanding of it from timely filing his federal habeas petition.

2. Pietrzak was not diligent in pursuing federal relief for his claims.

Pietrzak is also not entitled to equitable tolling because he was not diligent in pursuing federal relief on his claims. Instead, he allowed substantial expanses of time to pass during and between multiple rounds of various state proceedings before finally filing his federal habeas petition. Pietrzak failed to demonstrate that his lack of diligence was debatable.

Pietrzak's conviction became final for the purposes of § 2244(d)(1)(A) on June 1, 1998, the day the time for seeking direct appeal expired without a notice of appeal being filed. *See* Pet. Cert., App. 6-7; *Foreman v. Dretke*, 383 F.3d at 338, 341. His time for seeking federal habeas review of his claims began to run the next day and expired one year later, on June 2, 1999.

Pietrzak was aware that his notice of appeal was untimely filed by October 26, 1999, at the latest, when the intermediate court of appeals informed him by letter that it appeared to have been filed one day late. At that point he should have been aware that his AEDPA limitations period had not only begun due to the expiration of his time for filing notice of appeal, but that it had also expired. Pietrzak does not allege, however, that he did not know and could not have discovered before the expiration of his AEDPA limitations period that his notice had been untimely filed. Neither has he indicated that he was diligent in keeping apprized of actions taken in his case to learn that his appeal was untimely. Notably, even after he received notice from the court that his appeal appeared to be untimely, Pietrzak chose to wait for the court's final determination of that jurisdictional issue (seventy days). He did this even though he was unable to provide in his briefing any argument that the notice of appeal was timely and despite the fact that diligence in seeking relief was of the utmost importance to establishing a claim for equitable tolling.

After the court dismissed the appeal for lack of jurisdiction, instead of immediately seeking an out-of-time appeal through a state habeas application, he chose to pursue discretionary review by the Court of Criminal Appeals of the dismissal of his direct appeal as untimely. In his PDR, he alleged the merits of his substantive claims, actual innocence, and ineffective assistance of counsel depriving him of an appeal (not developed in the record), none of which the Court of Criminal Appeals had jurisdiction to review through a PDR because the issues had not been determined by the court of appeals. PDR at i-ii. A PDR was not the appropriate vehicle through

which to obtain the relief he sought. The fact that he chose to seek an out-of-time appeal in an ineffective manner does not entitle Pietrzak to equitable tolling. *See Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002). Pursuing this futile action took a total of 155 days, or just over five months.

Nor was Pietrzak diligent in pursuing relief even after the state-court proceedings on his untimely-filed notice concluded. He waited 344 days, over eleven months, after his PDR was refused to file his first state habeas application, although many of the claims he raised had already been fully briefed. PDR; SHCR-01 at index. He obtained an out-of-time appeal on September 19, 2001. *Ex parte Pietrzak*, No. 74,173, slip op.

Nor was Pietrzak diligent in pursuing federal habeas relief after his out-of-time appeal had concluded. He waited 171 days, almost another 6 months, to file his second state habeas application after the court of appeals had affirmed his conviction in his out-of-time appeal. *Pietrzak v. State*, 05-01-01687-CR, slip op. (Tex. App. Dallas, Jan. 23, 2002); SHCR-02 at index. He then waited 163 days, another five and a half months, after the Court of Criminal Appeals denied his second state habeas application to file his third state habeas application and his federal habeas petition. SHCR-03 at cover, D.E. 1.

Further, although Pietrzak claims entitlement to equitable tolling based on his misunderstanding of the state court's order granting an out-of-time appeal and the lack of explicit legal authority contradicting his erroneous interpretation, not only had his limitations period expired well before he obtained the court's order, but he was not diligent in pursuing his federal habeas relief even after

there was persuasive federal Circuit precedent contradicting his erroneous understanding. At the latest, such precedent existed by May 28, 2003, over a month before Pietrzak filed his second state habeas application. SHCR-02 index; *see Winkfield v. Bagley*, 66 Fed. Appx. at 582. Yet he did not file his federal petition for over two years after that time.

Nor was Pietrzak diligent in pursuing his federal claims after the Fifth Circuit issued its decision in *Salinas*. Pietrzak filed his federal habeas petition 485 days, almost a year and a half, from the date *Salinas* was decided. This was 368 days, or just over one year, from the Supreme Court's denial of certiorari review of *Salinas* on May 3, 2004. And it was 164 days, over five months, after his second state writ was denied.

At no time did Pietrzak attempt to file a protective federal habeas petition, raising his claims and seeking equitable tolling and a stay and abatement of the proceeding while he sought to exhaust his state court remedies, an action he could have taken as early as October 26, 1999, when the intermediate court of appeals informed him that it appeared that his notice of appeal had been untimely-filed. *C.f. Rhines v. Weber*, 544 U.S. 269, 278 (2005)(sanctioning such practice with respect to mixed petitions).

Because Pietrzak failed to exercise diligence in pursuing federal habeas relief of his claims, he could not be entitled to equitable tolling which requires that the petitioner be diligent in such pursuit. The Fifth Circuit correctly determined that the District Court's denial of equitable tolling would not be debatable by reasonable

jurists, and therefore did not err in denying a COA. Certiorari review of this determination should be denied.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

*EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

* Counsel of Record

MARTA R. McLAUGHLIN
Assistant Attorney General
Postconviction Litigation Division

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 936-1280
Email: Marta.McLaughlin@oag.state.tx.us

ATTORNEYS FOR
RESPONDENT